88-160 (1)

NO.

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1987

CARL CRONK,
Petitioner

VS.

THE UNITED STATES,
Respondent

PETITION FOR CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MILES H. APPLEBERRY
7300 Blanco, Suite 401
San Antonio, Texas 78216
(512) 344-1900
State Bar No. 1279000

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF APPELLANT'S COMPLAINT BECAUSE THE COMPLAINT WAS TIMELY FILED.

A. The Complaint Was Filed In November 1982.

B. The Filing Of The Complaint Commenced The Action And Tolled The Limitation Period

II. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF APPELLANT'S COMPLAINT AND THE MOTION FOR CORRECTIVE ORDER SHOULD HAVE BEEN GRANTED OR THE COMPLAINT HELD TO HAVE BEEN CONSTRUCTIVELY FILED.

III. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF APPELLANT'S COMPLAINT BECAUSE LIMITATIONS DID NOT BEGIN TO RUN UNTIL DEFENDANT BREACHED THE SETTLEMENT AGREEMENT IN 1982.

LIST OF PARTIES

Carl Cronk

The United States of America

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TABLE OF AUTHORITIES

REPORT OF OPINION

The opinion of the Claims Court is reported in 12 Cl. Ct. 512 (1987).

JURISDICTIONAL GROUNDS

(i) The date of the judgment sought to be reviewed is February 25, 1988.

(ii) The date of the order overruling rehearing is March 28, 1988.

(iii) The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. Sec. 1254(1).

STATUTES & RULES INVOLVED

The statutes and rules involved in this case are contained in the Appendix to this Petition.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below:

On or about November 5, 1982, Petitioner sent sixteen copies of his Original Complaint to the Clerk of the United States Court of Claims for filing along with the required filing fee. The jurisdictional basis for the suit is found in 28 U.S.C. § 1491(a)(1). On or about November 9, 1982, the Clerk of the Court of Appeals for the Federal Circuit (whose office was in the same building as the Claims Clerk's) returned all paperwork and the Petitioner's check even though he acknowledged that the papers were addressed to the Court of Claims. On November 17, 1982, the paperwork was again submitted to the United States Claims Court.

Thereafter, the Claims Court Clerk reports that another set of pleadings was received by his office from the Petitioner in July 1983, but the filing fee (previously twice tendered) was not to be found. Petitioner's attorney, however, had moved his office and did not receive the thrice-returned filing from the Clerk.

On or about February 5, 1987, Petitioner filed suit again since nothing could be located in the Clerk's office. Respondent filed a Motion to Dismiss on April 3, 1987.

On April 16, 1987, Petitioner filed a Reply to Defendant's Motion to Dismiss and a Motion for Corrective Order. The Court requested a report from the Clerk which was duly filed on June 22, 1987. On June 25, 1987, the

trial court granted the Motion to Dismiss entering its opinion and judgment. The Court of Appeals for the Federal Circuit affirmed the lower court's decision on February 25, 1988, and denied rehearing on March 28, 1988.

B. Statement of Facts:

Since this case was disposed of by way of a Motion to Dismiss, there is no transcript setting forth the facts. The facts, however, are set forth in the Plaintiff's Original Complaint and are, for the most part, uncontroverted.

Petitioner was an employee of the United States Postal Service (and its predecessor the United States Post Office). He had been employed at the post office in Portland, Maine, and in

January, 1977, he requested a transfer to the San Antonio, Texas post office. This request was denied primarily on the alleged basis that Petitioner was not able to perform the work.

In May, 1979, Petitioner filed an EEO complaint and also obtained a physical examination at Brooke Army Medical Center, Fort Sam Houston, Texas which showed that he could perform his duties.

On January 28, 1980, an agreement was reached between the Petitioner and the United States Postal Service in which the Petitioner agreed to withdraw his EEO complaint and the United States Postal Service agreed to employ Petitioner if he were physically qualified. Petitioner was apparently seen by a Dr. Robert L.

Jones sometime thereafter who found him to be unfit for duty in two job categories -- mail handler and city carrier. He did not find Petitioner to be disabled or disqualified form employment in all jobs for which he was qualified.

Instead of asking for enforcement of the settlement agreement of January 28, 1980, Petitioner filed for disability retirement on May 2, 1980. This requested retirement was denied at all levels and was finally ruled on by the Merit System Protection Board on April 2, 1982.

On June 17, 1982, for the first time, Petitioner requested that the United States Postal Service abide by the January, 1980, agreement and reinstate him to employment. The

reason for the request to honor the agreement was the finding by the Merit System Protection Board that he was not disabled for all positions; he, therefore, wanted to return to work. The United States Postal Service, however, did not reinstate him and told Petitioner that the matter is "closed".

ARGUMENT AND AUTHORITIES

I. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF PETITIONER'S COMPLAINT BECAUSE THE COMPLAINT WAS TIMELY FILED.

A. The Complaint Was Filed In November 1982.

Petitioner has previously pointed out to the Court the chronology of events concerning the filing of his complaint. Only a brief recapitulation will be made here.

The record is clear that the Clerk of the United States Claims Court received a complaint from the Petitioner on November 19, 1982. The Clerk's report then states because a penciled note reads that a call was not returned by Petitioner's attorney, "such indicates that the proposed complaint had not been submitted in conformity with court rules". It continues that since the call "evidently" was not returned that the proposed complaint was returned to Petitioner's attorney after "a few days" because that would have been "the customary practice" of the Clerk's office.

The Clerk's Report states that another complaint was received in his office on July 5, 1983. This

complaint was returned for failing to include the $60.00 filing fee.

The issue here is whether the Petitioner's submission of his complaint on November 19, 1982, commenced the action within the time allowed by 28 U.S.C. § 2501, the applicable statute of limitations.

The provisions of the filing rules of the Claims Court are analogous to and virtually identical with the parallel provisions of the Federal Rules of Civil Procedure.

Rule 3(a) of the Rules of the United States Claims Court provides:

"A civil action in this court shall be commenced by filing a complaint with the Clerk of the Court." Cf. Fed. R. Civ. P. Rule 3.

The question is, what is "filing" as defined by both the statute and the rule?

Ct. Cl. Rule 5(d) is some help. It provides:

"The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk." Cf. Fed. R. Civ. P. Rule 5(e).

The consensus of the Courts of Appeals throughout the country who have considered the question of what is "filing" is that "papers and pleadings including the original complaint are considered filed when they are placed in the possession of the clerk of the court". C. Wright & A. Miller, Federal Practice & Procedure § 1153 (1969) (emphasis added). Even constructive possession by the clerk is sufficient, but in

this case, actual possession is admitted. See U.S. v. Dae Rim Fishery Co., 794 F.2d 1392 (9th Cir. 1986). A complaint is filed when it is delivered to an officer of the court authorized to receive it. Robinson v. Waterman, S. S. Co., 7 FRD 51 (D.N.J. 1947); Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544 (5th Cir. 1978); Cinton v. Union Pacific R. Co., 813 F.2d 917 (9th Cir. 1987).

The Ninth Circuit discussed filing in three cases remarkably similar to the instant case. In Loya v. Desert Sands Unified School Dist., 721 F.2d 279 (9th Cir. 1983), the clerk received a complaint on the wrong size paper and refused to accept it. Subsequently, the plaintiff's action was dismissed. Had the

complaint been timely filed? The Court of Appeals said:

"A copy of the complaint arrived in the hands of the Clerk within the statutory period. To uphold the Clerk's rejection of it would elevate to the status of a jurisdictional requirement a local rule merely for the convenience of the court's own record keeping. While such interests are important, local rules...should not be applied in a manner that defeats altogether a litigant's right to access to the court." 719 F.2d 279 at 280.

The Court went on to hold that a complaint is "filed" when it arrives in the clerk's hands even if it fails to conform to local rules. Loya v. Desert Sands Unified School Dist., 721 F.2d (9th Cir. 1983); U.S. v. Dae Rim Fishery Co., 794 F.2d 1392 (9th Cir. 1986.

In the Cinton case, the clerk refused the complaint because it did not conform to local rules and because

the check was for the incorrect amount for the filing fee. Failure to pay a filing fee is not jurisdictional. Parisi v. Telechron, Inc., 349 U.S. 46 (1955). The Cinton court stated:

"In this case, the appellant constructively filed his complaint when, on August 27, 1985, he delivered it to the clerk of the court, though he was not in compliance with local rules and though he overpaid the filing fee. He therefore commenced the action within the three year statute of limitations at 45 U.S.C. § 56. Dismissal of his complaint as untimely was error." 813 F.2d 917 (9th Cir. 1987) at 921.

B. The Filing Of The Complaint Commenced The Action And Tolled The Limitation Period.

The date of filing marks the commencement of a federally created action. Ragan v. Merchant's Transfer & Warehouse Co., 337 U.S. 530 (1949); U.S. v. Malkin, 317 F. Supp. 612 (E.D. N.Y. 1970). As shown above,

Petitioner's cause of action was filed in November, 1982. In addition to the cases from the 9th Circuit already cited, the Court of Appeals in the District of Columbia, 5th, 6th, 8th, and 11th Circuits and the U.S. Supreme Court have held that filing commences the action for the purpose of tolling the statute of limitations. See e.g., Burnett v. N.Y. Cen. R.R. Co., 380 U.S. 424 (1965); Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921 (8th Cir. 1965); U.S. v. Wahl, 583 F.2d 285 (6th Cir. 1978); Caldwell v. Martin Marietta Corp., 632 F.2d 1184 (5th Cir. 1980); Jordan v. U.S., 694 F.2d 833 (D.C. Cir. 1982); Rodgers on behalf of Jones v. Bowen, 790 F.2d 1550 (11th Cir. 1986).

In the Respondent's Briefs in the courts below, much time and attention was given to pointing out what Petitioner's attorney should or should not have done from 1983 to 1987. None of that argument is relevant to the issue of whether the complaint was filed and whether limitations was tolled. Nor should the question of diligence be determined in summary proceedings. Byrd v. Bates, 243 F.2d 670 (5th Cir. 1957).

Of special interest on this point is the case of Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921 (8th Cir. 1965). In the Moore case, the court held that filing commences the action for purposes of the statute of limitations. No additional diligence

requirement can be read into this rule. In other words, what Petitioner may or may not have done does not alter the fact that the case was duly and properly filed within the proper limitations period. Indeed, the U.S. Supreme Court in the Burnett case, supra, stated that the filing of a lawsuit itself shows the proper diligence on the part of the plaintiff which statutes of limitations were intended to insure. See also, Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962).

II. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF PETITIONER'S COMPLAINT AND THE MOTION FOR CORRECTIVE ORDER SHOULD HAVE BEEN GRANTED OR THE COMPLAINT HELD TO HAVE BEEN CONSTRUCTIVELY FILED.

Although the trial court noted in its order that Petitioner's complaint

had been received by the Clerk of the Claims Court as early as November, 1982, and resubmitted in July, 1983, it incorrectly applied the definition of filing and refused to grant Petitioner's motion under Claims Court Rule 3(b)(2)(A) to correct the date of filing. The granting of such a motion is clearly within the discretion of the court, but in order to conform with the holdings of the cases noted above, this Court should either reverse and hold that motion be granted, or hold that the complaint was constructively filed in November, 1982. Cinton v. Union Pacific R.R. Co., 813 F.2d 917 (9th Cir. 1987).

The Claims Court's rules state that the date stamped on the complaint shall be final and conclusive evidence

of the date on which the complaint was filed. Cl. Ct. Rule 3(b)(1). What, then, is the purpose of Cl. Ct. Rule 3(b)(2)(A)? Petitioner contends that that rule was designed for just such a situation as here where no date was stamped on the complaint because the clerk erroneously refused to accept it. Properly applying the parts of Rule 3(b)(1) and 3(b)(2)(A) together, the complaint should be filed as of the date originally submitted. On the other hand, the Court could hold the complaint to have been constructively filed in November, 1982. This avoids applying a relation back form of fiction, confirms the proper procedural actions of the Clerk, but does not deny Petitioner a right to be

heard on the merits. Cinton v. Union Pacific R.R. Co., 813 F.2d 917 (9th Cir. 1987).

III. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF PETITIONER'S COMPLAINT BECAUSE LIMITATIONS DID NOT BEGIN TO RUN UNTIL DEFENDANT BREACHED THE SETTLEMENT AGREEMENT IN 1982.

Petitioner will not belabor the court with arguments and authorities already made and cited. Rather, Petitioner asks the Court to review the facts carefully.

Respondent in the trial court moved to dismiss Petitioner's suit on the grounds that Petitioner had waived his right to sue under a settlement agreement made with the United States Postal Service in January, 1980. The agreement provided for several things:

(1) withdrawal by Petitioner of an EEO complaint based on race and physical handicap; if after a (2)

physical examination of Petitioner by a certified orthopedic medical doctor to determine his suitability for employment; and (3) a review of that determination by the Postal Area Medical Offices if it was determined that Petitioner was not physically qualified.

Respondent argues that Petitioner withdrew his complaint and got all that he bargained for, but that if the Postal Service did not live up to its obligations, the waiver would not bar his suit.

Since Dr. Jones' findings did not disqualify Petitioner for all job descriptions for which he was eligible and since Petitioner's original EEO complaint had been based, in part, on physical handicap, how could he know if the Postal Service was living up to its obligations under the settlement agreement, until after it was

determined that Petitioner was not disabled? Even the trial court stated:

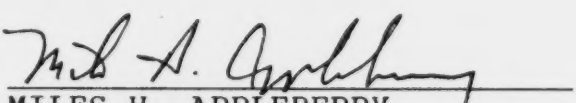
"Based upon a logical interpretation of the medical report, that plaintiff was not unable to perform all postal related work, and the MSPB decision that plaintiff was not totally disabled, plaintiff on June 17, 1982, requested that the USPS honor its settlement agreement with him and offer him a position in San Antonio. Defendant refused."

The settlement agreement, as noted above, was an amalgam covering at least three independent matters. Petitioner could not have known that Respondent would refuse to honor the agreement until he attempted to enforce it. Steiner v. U.S., 9 Cl. Ct. 307 (1986). Although relief might have been requested sooner, failure to request that the agreement be honored before 1982 is not a bar. Eamers v. Logan, 762 F.2d 83 (10th Cir. 1985).

CONCLUSION

For the reasons stated above and in particular because the opinions of the lower courts conflict with several holdings of other Courts of Appeal and this Court, Petitioner requests the Court to grant this Petition for Writ of Certiorari. Petitioner further requests the Court to reverse the judgments of the courts below, and to grant him a new trial.

Respectfully submitted,



MILES H. APPLEBERRY
7300 Blanco Rd., Suite 401
San Antonio, TX 78216-4939
(512) 344-1900
State Bar No. 01279000

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this the 21st day of July, 1988, I cause to be placed in the United States mail (first class mail, postage prepaid) three copies of "Petitioner's Petition for Certiorari" addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

MILES H. APPLEBERRY

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1565

CARL CRONK,

Plaintiff-Appellant

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: February 25, 1988

Before BISSELL, Circuit Judge, BALDWIN, Senior Circuit Judge, and ARCHER, Circuit Judge.

BALDWIN, Senior Circuit Judge.

DECISION

The United States Claims Court dismissed Carl Cronk's contractual complaint against the United States Postal Service as being barred by the statute of limitations. 28 U.S.C. §

2501 (1982). Cronk v. United States, 12 Cl. Ct. 512 (1987). We affirm on the basis of the lower court's decision.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1565

CARL CRONK,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES CLAIMS COURT in CASE NO(S). 63-87C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

ENTERED BY ORDER OF THE COURT

DATED Feb. 25, 1988

/s/
FRANCIS X. GINDHART,
Clerk

ISSUED AS A MANDATE: April 18, 1988
Costs: Against; Appellant
Printing.....$159.36
Total.....$159.36

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1565

CARL CRONK,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Before BISSELL, Circuit Judge, BALDWIN, Senior Circuit Judge and ARCHER, Circuit Judge.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/
FRANCIS X. GINDHART,
Clerk

March 28, 1988
Date

cc: Mr. Miles H. Appleberry
Mr. Joseph a. Kijewski

IN THE UNITED STATES CLAIMS COURT

No. 63-87C

(FILED: June 19, 1987)

****
CARL CRONK, *
Plaintiff, *
*
v. *
*
THE UNITED STATES, *
*
Defendant, *
****

ORDER

Counsel for plaintiff has filed with this court a Motion for Corrective Order pursuant to RUSCC 3(b)(2)(A) to change the date of filing of the original complaint in this court from February 5, 1987 to on or about November 27, 1982. Counsel for plaintiff states that the complaint was first sent to this court for filing on November 5, 1982, and that through clerical error was received by the Clerk of the United States Court of

Appeals for the Federal Circuit. The complaint was returned by that court on November 9, 1982, as untimely filed. Thereafter, on November 17, 1982, counsel alleges that, under separate cover, he mailed the same complaint to this court for filing. The record appears to indicate that the complaint was not filed in this court in 1982 and, in fact, was not filed here until February 5, 1987. Defendant has filed a Motion to Dismiss. One of the courts of the Motion to Dismiss alleges that plaintiff filed out of time; i.e., more than six years after the time the claim first accrued. 28 U.S.C. § 2501 (1982).

In order to resolve this issue the court hereby directs the Clerk of the court to review any and all records and

files that may contain pertinent information (1) to confirm that counsel for plaintiff did or did not file a complaint with this court at any time from on or about November 17, 1982, until February 5, 1987, and (2) if not filed on or about November 17, 1982, whether the Clerk's office had any other contacts relative to the receipt of the subject complaint between that date and the subsequent filing of the complaint on February 5, 1987. The Clerk is to advise the court of his findings no later than June 26, 1987.

IT IS SO ORDERED.

/s/

MOODY R. TIDWELL

Judge

IN THE UNITED STATES CLAIMS COURT

(FILED: June 22, 1987)

CARL CRONK,	)
	)
Plaintiff,	)
	)
v.	)
THE UNITED STATES,	)
	)
Defendant.	)

CLERK'S REPORT

This report is submitted in response to the court order of June 19, 1987 in this case.

(1) The records of the clerk's office indicate that no complaint bearing the above caption as to parties was filed with the court until the filing of the complaint in this case on February 5, 1987.

(2) The Clerk's correspondence file does indicate that on November 19, 1982 a proposed complaint bearing the caption "Carl Cronk v. Postal Service" was received in the clerk's office

under cover of a letter of November 17, 1982, over the signature of plaintiff's attorney of record in this case. Penciled note thereon in Clerk's handwriting reads "called 11/19/82--to return call; not in". Such indicates that the proposed complaint had not been submitted in conformity with court rules. In any event since the proposed complaint was not filed or otherwise retained, the call was evidently not returned and a few days later was returned. Such would have been in conformity with the customary practice in the office (copy of letter attached).

(3) The Clerk's correspondence filed also contains a copy of a letter by the clerk to plaintiff's present attorney of record dated July 8, 1983,

which has reference to a proposed complaint received from said attorney on July 5, 1983, bearing the caption "Carl Cronk v. United States Postal Service". A copy of that letter is attached and speaks for itself.

(4) There is nothing further either of record or in the Clerk's correspondence file indicating a response by counsel to the Clerk's letter of July 8, 1983, or any other contact with subject counsel until the receipt and filing of the complaint in this case on February 5, 1987.

/s/

CLERK OF COURT

LAW OFFICES OF MILES H. APPLEBERRY
800 N.W. LOOP 410
730 GPM SOUTH
SAN ANTONIO, TEXAS 78216
(512) 344-1900

November 17, 1982

United States Claim Court
7717 Madison Place N.W.
Washington, D.C. 20439

RE: Carl Cronk v.
Postal Service

Dear Sirs:

Under separate cover I am again submitting my client's original petition to be filed in the U.S. Claims Court. Apparently, through clerical error, the petition was delivered to the United States Court of Appeals for the Federal Circuit which is, as I understand it, in the same building as the Claims Court. I have subsequently discussed this error with the clerk of the Court of Appeals and they advised me that they will insure this error will not occur again.

Be advised that this is not an appeal from a decision of the Merit Systems Protection Board. It is an original proceeding to be filed in the Claims Court pursuant to the jurisdictional grant given to the Claims Court for contract disputes in which the amount sought to be recovered exceeds $10,000.00.

Thank you for your assistance in this matter.

Very truly yours,

/s/

MILES H. APPLEBERRY

mha/mic

OFFICE OF THE CLERK
UNITED STATES CLAIMS COURT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 2005

July 8, 1983

Miles H. Appleberry, Esquire
730 GPM Bldg. - South Tower
San Antonio, TX 78216

In re: CARL CRONK v. UNITED STATES POSTAL SERVICE

Dear Mr. Appleberry:

I return herewith the original of the proposed complaint over your signature received July 5, 1983, bearing the above caption. A phone call to your office of that date was made and in your absence, it was requested that you return the call. No such call has been received.

As to your proposed complaint while copies were received and returned this date under separate cover, the $60.00 filing fee was not included. Also, the complaint lists the incorrect defendant. It is the United States that appears as the defendant in all actions filed here and not individual agencies thereof.

You will find this court's rules in the 1983 pocket parts to 28 USCA Rules.

Sincerely yours,

Clerk

IN THE UNITED STATES CLAIMS COURT

No. 63-87 C

CARL CRONK

v. JUDGMENT

THE UNITED STATES

Filed June 25, 1987

Pursuant to the order of June 25, 1987, granting defendant's motion to dismiss.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

Frank T. Peartree

Clerk of Court

June 25, 1987 By: /s/

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read:

"Filing Notice of Appeal.....$105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

IN THE UNITED STATES CLAIMS COURT

No. 63-87C

(FILED: June 25, 1987)

CARL CRONK,	*
	*
Plaintiff,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*

Miles H. Appleberry, San Antonio, Texas, for plaintiff.

Joseph A. Kijewski, Washington, D.C., with whom was Assistant Attorney General Richard K. Willard, for defendant. Sherry A. Cagnoli, Karen A. Intrater and Geoffrey A. Drucker, United States Postal Service, of counsel.

ORDER

TIDWELL, Judge:

This case is before the court on defendant's motion to dismiss,

plaintiff's opposition and motion for corrective order, and defendant's opposition to plaintiff's motion for corrective order.

Plaintiff had been employed in the United States Postal Service (USPS) and its predecessor, the United States Post Office, in Portland, Maine. In January 1979 he requested a transfer to the San Antonio, Texas Post Office, but that request was denied on the basis of his physical inability to perform the work. On May 11, 1979 plaintiff filed a discrimination complaint based upon race and handicap against the USPS. Eight months later, on January 28, 1980, plaintiff and USPS agreed that:

> Mr. Carl Cronk will be scheduled for a medical examination by a certified orthopedic medical doctor, at Postal Service expense, to determine his physical suitability for Postal employment, subject to review by the Postal Area Medical Officer.
>
> Mr. Cronk will be offered Postal employment at the San Antonio Post Office if physically qualified. If not physically qualified, he withdraws this [discrimination] complaint.

Dr. Robert L. Jones, a certified orthopedist, examined plaintiff and found him unfit for the duties of a mail handler or city carrier. He did not find that plaintiff was unable to perform all postal jobs for which he was qualified. Thereafter, the USPS Medical Officer determined that plaintiff "would not be medically suitable for any job requiring heavy lifting, pushing or pulling such as a

clerk, carrier, custodian, or mail handler." Based on those findings and "an overall review of [the] case", the USPS General Manager, Employee Relations Division, Southern Regional Office, Memphis, Tennessee, refused to reinstate or reassign plaintiff to any position in the San Antonio Post Office. Concurrently, plaintiff received notice of intent to remove him from the USPS from the Management Sectional Center, Portland, Maine. Plaintiff then filed for a disability retirement on May 2, 1980 which was denied by USPS. Plaintiff was removed from the USPS and on December 24, 1981 filed an appeal with the Merit Systems Protection Board (MSPB), Dallas Regional Office, challenging the disallowance of his application for

disability retirement. The MSPB found that plaintiff had failed to establish by a preponderance of the evidence that he was disabled. That decision became final on May 7, 1982.

Based upon a logical interpretation of the medical report, that plaintiff was not unable to perform all postal related work, and the MSPB decision that plaintiff was not totally disabled, plaintiff on June 17, 1982, requested that the USPS honor its settlement agreement with him and offer him a position in San Antonio. Defendant refused.

On November 5, 1982 plaintiff submitted a petition for filing

addressed to the United States Claim (sic) Court. apparently, through clerical error, the petition bearing the caption "Carl Cronk v. Postal Service" was delivered to the Clerk of the United States Court of Appeals for the Federal Circuit which is located at the same address as this court. The Clerk of the Court of Appeals assumed that plaintiff's petition was in the nature of an appeal from the MSPB decision of May 7, 1982 and, on November 8, 1982, returned it to counsel for plaintiff as being filed out of time. 1/ On November 17, 1982

1/ The jurisdictional statute of the United States Court of Appeals for the Federal Circuit, in effect at that

counsel for plaintiff wrote to this court advising that the petition would be delivered under separate cover and that it was not an appeal from the MSPB decision but for breach of the January 28, 1980 settlement agreement (contract) between plaintiff and USPS.

Records show that on November 19, 1982 a petition again bearing the caption "Carl Cronk v. Postal Service" was received at this court. The petition was not in conformity with the rules of this court and on the same date as receipt the Clerk of this court telephoned plaintiff's counsel of record to so advise him. Counsel was not reached and a message was left to

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time, required that a petition for review of the MSPB's decision be filed within 30 days from the date the final decision was received. 5 U.S.C. § 7703 (1982).

return the Clerk's telephone call. The telephone call was not returned and several days later the petition was returned unfiled to counsel for plaintiff. On July 5, 1983 the court received another petition bearing the caption "Carl Cronk v. United States Postal Service." That petition was likewise deficient in that the $60.00 filing fee was not included, RUSCC 77(k)(2), and the caption was incorrect. The Clerk again telephoned counsel for plaintiff to inform him of the deficiencies, but counsel was not available. Again, a call and, again, it was not returned. The July 5, 1983 petition was likewise returned to counsel for plaintiff on July 8, 1983. The court notes that plaintiff's attempted filing of the petition in

1983 is clear proof that plaintiff had knowledge that the petition had not been filed in 1982. It is also noted by the court that had plaintiff perfected his filing in 1983 he would not now be facing the bar of the statute of limitations.

Following plaintiff's 1983 unsuccessful attempt to file the petition, nothing more was heard from plaintiff until February 5, 1987 when "Plaintiff's Original Complaint," correctly drafted and submitted, was received and filed by this court. On April 3, 1987 defendant moved to dismiss the complaint as untimely filed. 2/ On April 23, 1987 plaintiff

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2/ The statute of limitations provision states that:

"Every claim of which the United States Claims Court has jurisdiction

moved to have the filing date of the complaint "corrected" to show that it was filed on or about November 27, 1982 which would correspond to plaintiff's aborted attempted filing of November 17, 1982. This, the court cannot do. As seen, plaintiff attempted to file his petition twice, in 1982 and 1983, but was not successful. To wait four years, knowing that the petition had not been filed is inexcusable and flies in the face of the very reason for the six-year statute of limitations, to wit: "[A]n individual is expected to act with reasonable diligence in the protection of his interests. . . ." Mitchell v. United States, 10 Cl. Ct.

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shall be barred unless the petition thereon is filed within six years after such claim first accrues."
28 U.S.C. § 2501 (1982).

63, 67 (1986), modified in part, 10 Cl. Ct. 787. This six-year statute of limitations is a jurisdictional requirement that must be interpreted narrowly and may not be waived by the court. Farrell v. United States, 9 Cl. Ct. 757, 758-59 (1986). Even if it were so inclined, the court may not grant plaintiff's motion to "correct" the effective date of the filing of the complaint. It would be an abuse of discretion for this court to extend a filing deadline due to an attorney's oversight or mistake. Prestex v. United States, 4 Cl. Ct. 14, 16-17 (1983), aff'd, 746 F.2d 1489 (Fed. Cir. 1984).

The court will now address the timeliness of the 1987 filing to determine if the complaint was filed

within or without the six-year statute of limitations. To do so, the court must determine when the claim first accrued. 28 U.S.C. § 2501 (1982). All of the events necessary to fix the apparent liability of the United States for its breach of the January 28, 1980 agreement had occurred by April 17, 1980 when the USPS General Manager, Employee Relations Division, Southern Regional Office, informed plaintiff that he would not be reinstated nor reassigned to any position in the San Antonio Post Office. See LaMear v. United States, 9 Cl. Ct. 562, 569 (1986), aff'd 809 F.2d 789 (Fed. Cir. 1986). This finding is buttressed by plaintiff's own words in the 1987 complaint that "[b]eginning on April 17, 1980, defendant refused to abide by

the January 1980 [contract]." Plaintiff's time for filing expired on April 17, 1986. almost seven years lapsed between April 17, 1980 and February 5, 1987. Thus, plaintiff failed to act within the time permitted and is now time-barred from bringing suit.

Plaintiff's argument that the cause of action occurred at a later date are without merit. Plaintiff may well have later appealed or requested reconsideration of the April 17, 1980 decision within the USPS. However, the evidence is clear that the USPS was firm in its position and that the denial was not open to further discussion. Plaintiff cannot be permitted to change the date his claim accrued, or toll the statute of

limitations, by filing documents after the fact which would purport to reopen the matter. Nor does plaintiff's action before the MSPB alter the fact that his claim before this court accrued on April 17, 1980. Plaintiff's action before the MSPB was based on the USPS denial of disability retirement and not the settlement agreement of his discrimination complaint. Plaintiff's claim did not accrue on a later date as he may have thought; it occurred on the date found by this curt after review of all the pertinent documents, facts and arguments. It is the court that must determine the nature of the action. Maier v. Orr, 754 F.2d 973, 982 (Fed. Cir. 1985), reh. denied, 758 F.2d 1578. Plaintiff cannot escape his inadvertent admission against self-

interest that the claim accrued on April 17, 1980. As indicated, that admission buttresses the court's own findings, leaving no question that the claim accrued on that date.

After thorough analysis of the facts and law applicable to the issues, the court denies plaintiff's motion to order the date of filing of the complaint to be changed from February 5, 1987 to on or about November 27, 1982, and grants defendant's motion to dismiss the complaint as untimely filed. The Clerk is ordered to enter judgment dismissing the complaint. No costs.

IT IS SO ORDERED.

/s/
MOODY R. TIDWELL
Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

Carl Cronk, Appellant, v. Office of Personnel Management, Respondent.	No. DA831L8210264 Date: April 2,1982

DECISION

Introduction

Appellant filed an appeal on December 24, 1981 from the reconsideration decision of the Office of Personnel Management (OPM) which disallowed his application for disability retirement from the position of distribution Clerk with the United States Postal Service.

Jurisdiction

A federal employee has the right to appeal to the Merit Systems

Protection Board (the Board) from a final administrative action affecting his right to a disability retirement annuity. 5 U.S.C. § 8347(d), 5 C.F.R. §831.110 (1981). Since OPM's reconsideration decision disallowed appellant's application for disability retirement, I find that he has a statutory and regulatory right of appeal to the Board.

Analysis and Findings

An employee must complete at least five years of federal civilian service to be eligible for a retirement annuity. 5 U.S.C. §§8333, 8337(a). An application for disability retirement must be filed by an employee before the employee is separated from federal service or within one year thereafter. 5 U.S.C. § 8337(b). The record shows

that at the time of appellant's application he was employed by the United States Postal Service 1/ and had completed more than five years of federal civilian service.

The Board has held that in an appeal from an OPM decision on a voluntarily initiated employee application for disability retirement it is the employee who bears the ultimate burden of persuasion of showing disability by a preponderance of the evidence. Chavez v. Office of Personnel Management, MSPB Docket No. DA831L0 9003 (May 28, 1981). A preponderance of the evidence which has been defined by the Board to be that degree of relevent evidence which a reasonable mind,

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1/ Appellant's application for retirement was dated May 2, 1980. He was removed from the rolls of the Postal Service on June 13, 1980.

considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 5 C.F.R. § 1201.56(c)(2)(1982).

Accordingly, the issue to be determined in this appeal is whether appellant has shown by a preponderance of the evidence that he is disabled. The terms "disabled" and "disability" are defined at 5 U.S.C. § 8331(6) 2/ as, ". . . totally disabled or total disability, respectively, for useful and efficient service in the grade or

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2/ Effective March 5, 1981, 5 U.S.C. § 8331(6) was repealed by the Act of December 5, 1980, Pub. L. 96-499, Title IV, § 403(b); 94 Stat. 2606. Since the instant application for disability retirement was filed in May of 1980, those changes have no bearing on the statutory and regulatory provisions applicable in the adjudication of this case. 46 Fed. Reg. 16653, 16654 (1981).

class of position last occupied by the employee . . . because of disease or injury . . ." In his application for disability retirement, appellant stated that he was disabled due to, "Back injury sustained in 1970 - a local orthopedic surgeon and the Postal Service Southern Region Medical Officer have found me unfit to perform my duties."

The medical evidence of record does not establish that appellant is totally disabled for useful and efficient service in the position he occupied. In a report of examination dated August 14, 1980, Dr. Robert L. Jones declared that appellant denied having any problems with his back even when he was doing heavy lifting and bending and that he had been doing

heavy work for another company since 1979. X-rays of the lumbosacral spine showed a bilateral L-5 spondylolysis without a spondylolisthesis. Dr. Jones stated that appellant had a pre-existing developmental anomaly. Although he could find no evidence of an injury at that point in time, it was Dr. Jones' opinion that the activities of a Mail Handler or of a City Carrier would "probably" aggravate appellant's anomaly. 3/ Dr. Jones did not state that appellant was totally disabled for useful and efficient service in his position.

3/ Appellant had occupied the position of Distribution Clerk, not the position of Mail Handler or City Carrier. There is no evidence in the record which would allow a comparison of the physical requirements of these positions.

The record contains a Superior Officer's Statement which was signed by Mr. Hugh L. Valley on July 6, 1979. In that statement, Mr. Valley iterated that appellant had been unable to continue to perform as a Machine Operator due to severe headaches. 4/ Mr. Valley also stated that appellant had been absent because of illness for 13 days within the previous two years.

The record also contains various other medical reports of examinations that appellant underwent between 1970 and 1972. These reports show that appellant fell and injured himself on June 30, 1970. The most important of

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4/ There is no evidence in the record to show whether a Machine Operator position is comparable (in terms of physical requirements) to the positions of Distribution Clerk, Mail Handler, or City Carrier.

the medical statements contained in the file will be discussed below. On August 18, 1970, Dr. Carl A. Brinkman, stated that appellant had suffered extensive ligamentous injury and was showing the usual slow recovery from that injury. In August of 1970, Dr. Marion J. Marcucci examined appellant and declared that the objective physical findings were within normal limits and that appellant probably had suffered muscle tears which take a long time to heal.

On December 8, 1981, Dr. George P. Long stated that there was no objective evidence that appellant had a neurologic defect or any myopathy in the lower extremities. On March 3, 1971, Dr. John J. Lorentz stated that he was sure that appellant had a

muscular ligamentous strain of his back as the result of his injury and that he supposed that it could be labeled as a psychophysiological limitation of a muscular ligamentous strain. He reported that his examination of appellant was essentially negative. On July 18, 1972, Dr. Samuel Weiss examined appellant and offered the diagnosis of post-traumatic cephalgia and lumbosacral strain-chronic. On April 22, 1972, Dr. M. C. Hothem gave his diagnosis as chronic post-traumatic cephalgia and chronic post-traumatic somatic dysfunction of cervicodorso lumbar areas. 5/

None of the physicians who examined appellant from 1970 through

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5/ The record shows that a previous application for disability retirement was denied in 1972.

the present stated that appellant is totally disabled for useful and efficient service in the position of Distribution Clerk. Furthermore, upon my careful review of those reports of examination, I find that there is no objective medical evidence to show that appellant is totally disabled.

The Board has held, however, that all relevant evidence presented on appeal is to be considered by the Board in determining whether an appellant is disabled. Chavez v. Office of Personnel Management, supra. Accordingly, I have considered appellant's petition of appeal and other documentation that he submitted to the Board. 6/ In his petition of appeal, dated December 21, 1981, appellant stated that he wished

6/ Appellant did not request a hearing in connection with his appeal.

to appeal OPM's decision because he had been promised employment at the San Antonio Post Office in 1979 if he passed a physical at Fort Sam Houston, San Antonio, Texas. He stated that he had passed the physical with no limitations but that evidently the "local office" had a Dr. Battazar overrule the findings of the Army doctor and that he was then told to apply for disability. He claimed that he had a copy of the Army doctor's report of examination, but he did not offer this report into evidence. Appellant's statements in this matter would seem to show that he was not totally disabled for useful and efficient service in the position of Distribution Clerk.

Appellant also stated that Dr. Jones, whose report has been discussed above, orally told him that he had a piece of his spine missing, that he should never have been in the Armed Services, and that he could not lift more than 15 pounds. This statement is totally contrary to the report of examination provided by Dr. Jones.

In a later submission, dated January 16, 1982, appellant stated that he would be in the hospital the week of January 25, 1982. Appellant did not state why he was to enter the hospital. He also submitted a letter dated January 8, 1982, from Dr. John J. Saldana, Sectional Center Manager/Postmaster, San Antonio, Texas. In that letter, Mr. Saldana denied appellant's

request for reinstatement. 7/ Mr. Saldana stated that an unidentified "orthopedic medical doctor" had examined appellant in 1980 and that his report had been reviewed by the Postal Service's Medical Officer. Mr. Saldana stated that the Medical Officer (who is also unidentified) had determined that appellant was not medically suitable for any job requiring heavy lifting, pushing, or pulling, such as Clerk, Carrier, Custodian, or Mail Handler.

Apparently, appellant entered this letter into the record in order to show that the Postal Service regarded him as being totally disabled. However, this letter is simply not sufficient to show that appellant is totally disabled for

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7/ The evidence of record does not reveal when appellant's request for reinstatement was made.

his position. Appellant did not provide the report of examination referred to by Mr. Saldana nor the report from the Postal Service's Medical Officer. Therefore, it is impossible to ascertain the medical basis for the Postal Service's determination that appellant was not medically suitable for a position. On consideration of the record, I find that appellant has failed to establish by a preponderance of the evidence that he is disabled.

Decision

The agency's decision is hereby affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Board on May 7, 1982, unless a petition for

review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or,

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. § 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

FOR THE BOARD:

/s/
MARK KELLEHER
Presiding Official

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision was sent by regular mail this date to the following:

Mr. Carl Cronk
9518 Tarleton
San Antonio, Texas 78221

Associate Director for Compensation
Retirement and Insurance Programs
Office of Personnel Management
P.O. Box 16
Washington, D.C. 20044

Date: April 2, 1982

DALLAS, TEXAS

/s/
For:
MARK KELLEHER
Presiding Official

STATUTES INVOLVED

28 U.S.C. § 1491(a)(1):

"The United States Claims court shall have jurisdiction to render judgment upon any claim against the Constitution, or any Act of Congress or any regulation of an executive department, upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort...."

28 U.S.C. § 2501:

"Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Fed. R. Civ. P. Rule 3:

"A civil action is commenced by filing a complaint with the court."

Fed. R. Civ. P. Rule 5(e):

"(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk."

Cl. Ct. Rule 3(a):

"(a) Complaint; Filing Period. A civil action in this court shall be commenced by filing a complaint with the Clerk of the Court."

Cl. Ct. Rule 3(b)(1):

"(b) Date of Filing. (1) The records of the clerk, including the date stamped on the complaint, shall be final and conclusive evidence of the date on which a complaint was filed, in the absence of the filing and allowing of a motion under subdivision (b)(2) of this rule."

Cl. Ct. Rule 3(b)(2)(A):

"(2)(A) A party plaintiff who contends that the effective date of his complaint should properly be a date earlier than that shown by the clerk's records may seek a corrective order from the court by means of a motion."

Cl. Ct. Rule 5(d):

"(d) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. All matters are to be brought to the attention of a

judge through formal filings rather than by correspondence; letters are not to be directed to a judge unless specifically requested.

No. 88-160

In the Supreme Court of the United States

OCTOBER TERM, 1988

CARL CRONK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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No. 88-160

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his action against the United States for breach of contract was commenced within the statute of limitations.

1. Petitioner was an employee of the United States Postal Service (Pet. App. 20). In January 1979, petitioner sought a transfer from his position in Portland, Maine, to the Postal Service office in San Antonio, Texas (*ibid.*). When the transfer was denied, petitioner filed administrative charges of illegal discrimination against the Postal Service (*ibid.*). On January 28, 1980, petitioner and the Postal Service reached a settlement agreement. Petitioner agreed to withdraw his claim of discrimination and the Postal Service agreed to employ him in San Antonio if he was found to be physically qualified (*id.* at 20-21).

On November 19, 1982, the United States Claims Court received from petitioner a proposed complaint against the "Postal Service" (Pet. App. 10).[1] The clerk of the court

[1] Two weeks earlier, the same complaint had been delivered to the Court of Appeals for the Federal Circuit by mistake.

telephoned petitioner's counsel to inform him that the proposed filing did not satisfy the court's rules, but the clerk was told that counsel was "not in" (*id.* at 11). The clerk left a message; petitioner's counsel, however, did not return the call. Thus, several days later, the clerk returned the complaint, which was not filed, to petitioner's counsel (*id.* at 25-26).

On July 5, 1983, the clerk of the Claims Court received another proposed complaint from petitioner that named the "United States Postal Service" as the defendant (Pet. App. 26). That proposed complaint was defective—the United States, not the Postal Service, is the proper defendant in the Claims Court (see 28 U.S.C. 1491), and the complaint was not accompanied by the filing fee. The clerk telephoned petitioner's counsel who was not available and who did not return the call (Pet. App. 26). On July 8, 1983, the clerk returned this proposed complaint to petitioner's lawyer without filing it. Petitioner took no further action for almost four years (*id.* at 27).

On February 5, 1987, petitioner filed in the Claims Court "Plaintiff's Original Complaint," in which he asserts an action against the United States for breach of the 1980 settlement agreement (Pet. App. 27). Specifically, petitioner alleges in his complaint that he withdrew his discrimination charges, but by April 1980 the Postal Service "refused to abide by * * * the agreement" (Complaint ¶ 7). The government moved to dismiss the action as barred by the applicable six-year statute of limitations (28 U.S.C. 2501). The Claims Court granted the government's motion. The court held that petitioner's cause of action accrued in 1980; thus, petitioner's 1987 complaint was filed outside the limitations period (Pet. App. 31-33). The court rejected petitioner's contention that his complaint should be deemed filed as of November 1982, when he submitted a

defective complaint that was returned by the clerk. Commenting on counsel's actions, the court stated: "To wait four years, knowing that the [complaint] had not been filed is inexcusable and flies in the face of the very reason for the six-year statute of limitations" (*id.* at 28). The Federal Circuit affirmed the Claims Court's judgment on the basis of the lower court's opinion (*id.* at 1-2).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

a. Petitioner alleges in his complaint that, as of April 17, 1980, the Postal Service "refused to abide by the January 1980 [agreement]" (Pet. App. 30-31).[2] Petitioner's breach-of-contract claim thus accrued in April 1980. See *LaMear* v. *United States,* 9 Cl. Ct. 562, aff'd, 809 F.2d 789 (Fed. Cir. 1986). Accordingly, petitioner's action is barred by the six-year statute of limitations for actions in the Claims Court if the action was not commenced by April 1986.

A case is commenced when the plaintiff files a complaint. See Cl. Ct. R. 3(a) and (b)(1); *Caldwell* v. *Martin Marietta Corp.,* 632 F.2d 1184, 1188 (5th Cir. 1980). Here, petitioner's complaint was filed in 1987, outside of the limitations period. To avoid that result, petitioner argues (Pet. 8-18) that his complaint should be deemed to have been filed in 1982 when the defective complaint against the Postal Service was mailed to the Claims Court. Petitioner's argument is without merit.

Petitioner cites cases (Pet. 10-11) holding that a complaint may be deemed filed at the time it is submitted to a

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[2] At that time, the Postal Service informed petitioner that he would not be assigned to any position in San Antonio (Pet. App. 30). Petitioner then filed for disability-retirement benefits (Pet. 5).

court clerk even though the clerk refuses to file the complaint until formal deficiencies (*e.g.*, size of paper) are corrected. Those cases, however, do not aid petitioner. In those cases, "the deviations generally are minor and the results reached are in accord with the spirit of the rules." 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1052, at 168 (1987). See, *e.g.*, *Loya* v. *Desert Sands Unified School District*, 721 F.2d 279, 280 (9th Cir. 1983) (clerk did not file complaint when it was submitted because it was typed on 8½ by 13 inch paper instead of 8½ by 11 inch paper).

Here, the conduct of petitioner and his counsel support the court of appeals' conclusion that principles of fairness do not dictate that petitioner's complaint be deemed filed in 1982. First, the errors in the 1982 and 1983 complaints were not minor; those complaints named as a defendant a party (the Postal Service) that may not be sued by a private party in the Claims Court. Second, if the complaint were "filed" in 1982, it remained dormant for five years. Undoubtedly, during that five-year period, the defendant (whether the United States or the Postal Service) could have had the case dismissed without prejudice for failure to prosecute. See Cl. Ct. R. 41(b). In such a case, petitioner's 1987 complaint would have been untimely because the filing of a suit which is dismissed without prejudice does not toll the statute of limitations. See *Wilson* v. *Grumman Ohio Corp.*, 815 F.2d 26, 28 (6th Cir. 1987); *Stein* v. *Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982); *Dupree* v. *Jefferson*, 666 F.2d 606, 611 (D.C. Cir. 1981).

b. In any event, the Claims Court's judgment of dismissal is correct even if petitioner's complaint were deemed filed as of 1982. The United States was not named as a defendant in the 1982 complaint.[3] The United States

[3] The Postal Service, of course, is not the legal equivalent of the United States. Congress created the Postal Service in 1970 and em-

was first made a party in petitioner's 1987 pleading, which must be an "amended complaint" under petitioner's view of the case. The record shows (Pet. App. 10-12), however, that the clerk of the Claims Court never issued a summons in 1982; thus, petitioner did not serve the Postal Service nor the United States with process. Hence, the 1987 "amended complaint" does not relate back to the original pleading for purposes of the statute of limitations (see Fed. R. Civ. P. 15(c)). Accordingly, even under petitioner's theory, the action against the United States was commenced in 1987, after the limitations period had expired.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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powered it "to sue and be sued in its official name" (39 U.S.C. 401(1)). In *Loeffler* v. *Frank*, No. 86-1431, (June 13, 1988), this Court noted that Congress " 'launched [the Postal Service] into the commercial world' " (slip op. 6 (citation omitted)). The Court observed: "Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise' " (*ibid.* (citation omitted)).

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